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NOTES OF RECENT CASES.

Wadsworth, J. Vyaghreswarudu *v.* Bhadramma.
2nd April, 1942. **C.R.P. No. 718 of 1940.**

Hindu law—Family debt—Insolvent father—Power to acknowledge debt.

Where there is a family debt a Hindu father who continues to be the joint family manager can even after his adjudication as an insolvent save limitation by his acknowledgment as against the other coparceners. If an insolvent after his adjudication can acknowledge his own debt he can equally acknowledge a debt binding on the family of which he still remains the manager notwithstanding his insolvency.

K. Bhimasankaram for Petitioner.

P. Somasundaram and *P. Suryanarayana* for Respondent.

K.S.

Horwill, J. Dakshinamurthi, *In re.*
30th June, 1942. **Crl. R. C. No. 192 of 1942.**
(Crl. R. P. No. 179 of 1942.)

Criminal Procedure Code (V of 1898), S. 370 (1)—Necessity to state reasons for conviction—Procedure.

S. 370 (1) of the Code of Criminal Procedure requires the Magistrate to give a brief statement of the reasons for the conviction of an accused. A brief statement of the reasons for conviction would necessitate a reference to what the prosecution witnesses had said, so that it could be shown that that evidence if believed would establish the offence with which the accused had been charged. If there had been no defence witnesses, it would have been sufficient if the Magistrate had said that he believed the prosecution witnesses but when there is defence evidence which is inconsistent with the prosecution story some brief reasons should also be given as to why the defence evidence should be discredited.

V. N. Shama Rao and *B. T. Sundararajan* for Accused.

T. Ramaseshan for Crown Prosecutor on behalf of the Crown.

K.S.

Horwill, J. The Public Prosecutor *v.* Rajam Ammal.
30th June, 1942. **Crl. R. C. No. 231 of 1942.**
(Crl. R. P. No. 217 of 1942.)

Borstal Schools Act (V of 1926)—Not applicable to adolescent girls.

S. 2 of the Borstal Schools Act says that the Provincial Government may by notification from time to time, apply the whole or any of the provisions of the Act to adolescent offenders or any class thereof in any local

area in the presidency of Madras. By Law (General) Department Notification No. 64 of 26th January, 1927 (*Fort St. George Gazette*) the Act was made applicable to adolescent offenders of the male sex. Accordingly adolescent girls cannot be sent to a Borstal School and must be convicted in the ordinary way.

N. Somasundaram for Public Prosecutor.

Accused not represented.

K.S.

Horwill, J.
1st July, 1942.

Kandaswamy Pillai *v.* Municipal Prosecutor, Palghat.
Crl. R. C. No. 178 of 1942.
(Crl. R. P. No. 165 of 1942.)

Madras District Municipalities Act (V of 1920), S. 181 (2)—Panels of window swinging over road only in the process of opening and shutting—Not hit by the section.

What is prohibited by S. 181 of the District Municipalities Act is the erecting without licence of a window, door, gate or bar that, when in its normal open position projects over the street. Accordingly where a window was parallel to the wall adjoining a street and it was only in the process of opening and shutting that the panels of the window swung over a small area of the street and did not project on the road when fastened or shut, it did not come within the mischief of S. 181 (2) of the Act.

S. V. Venkatasubramaniam for Petitioner.

A. S. Sivakaminathan for Public Prosecutor.

K.S.

Horwill, J.
1st July, 1942.

Appalaswamy. *In re.*
Crl. R. C. No. 258 of 1942.
(Crl. R. P. No. 244 of 1942.)

Defence of India Rules (1939)—Mere possession of literature containing seditious views—Heavy sentence—Liability for.

Possession *simpliciter* of seditious literature or manuscripts is liable to draw a heavy sentence under the Defence of India Rules. Where the manuscript found in the accused's possession indicated that the literature was intended to be disseminated the fact that the accused did not own the literature is no ground for reducing the sentence.

M. Appa Rao for Accused.

N. Somasundaram for Public Prosecutor on behalf of the Crown.

K.S.

Kuppuswami Ayyar, J.
29th June, 1942.

Abdul Subhan Sahib *v.* Abdul Ravoof Sahib.
S.A. No. 924 of 1941.

Partnership Act (*IX of* 1932), *S.* 69 (2)—*Scope and applicability.*

S. 69 (2) of the Partnership Act has no application to a suit for the enforcement of an agreement entered into after the dissolution or at the time of the dissolution between the partners of an unregistered firm under which some definite amount was payable by one partner to another because it does not relate to a suit on behalf of the partnership.

I.L.R. (1937) Bom. 628 and A.I.R. 1938 Rang. 108, distinguished.

K. P. Ramakrishna Aiyar for Appellant.

B. Pocker for Respondent.

K.S.

Kuppuswami Ayyar, J.
2nd July, 1942.

Sathappa Chetti *v.* Thayyanayaki Ammal.
S.A. No. 978 of 1940.

Adverse possession—Delivery of symbolical possession during the period of adverse possession—Effect.

Where the plaintiff was entitled to take actual possession of the property purchased by him in a revenue sale but instead he got only symbolical possession in respect of a building on the site in the occupation of the defendant, the taking of symbolical possession interfered with the possession of the defendant and the defendant could start his adverse possession only from the date of the delivery of the symbolical possession.

(1927) 53 M.L.J. 339, relied on.

N. G. Krishna Aiyangar for Appellant.

M. S. Venkatarama Aiyar for Respondent.

K.S.

Horwill, J.
3rd July, 1942.

Sundaresam Pillai *v.* Ramachandra Pillai.
C.R.P. No. 593 of 1941.

Civil Procedure Code (*V of* 1908), *O.* 9, *r.* 9—*Scope.*

O. 9, r. 9 of the Civil Procedure Code permits the setting aside of an *ex parte* decree only when the plaintiff is unable to be present; and that inability does not mean inability to raise the wherewithal to continue the suit—whether due to lack of funds or absence of witness—but some physical inability due to the break down of a conveyance or illness.

S. Panchapagesa Sastri and *P. S. Ramachandran* for Petitioner.

R. Swaminatha Aiyar for Respondent.

K.S.

Horwill, J.
9th July, 1942.

Govindan, *In re.*
Cr.R.C. No. 197 of 1942.
(Cr.R.P. No. 184 of 1942).

Cantonments Act (*II of* 1924), *S.* 118 (*a*) (*ii*)—*Offence punishable under—Form of order.*

In a summary trial for an offence of using threatening and abusive or insulting words punishable under S. 118 (*a*) (*ii*) of the Cantonments Act though it is not necessary that the Magistrate should record what the prosecution witnesses actually said, it is however necessary in convicting the accused to give a brief statement of the reasons. Such a statement of reasons would necessitate at least a short summary of what the prosecution witnesses had said so as to indicate that the evidence had made out the case with which the accused had been charged and also that the Magistrates had believed that evidence. If there was defence evidence it would further be necessary to say why they preferred the evidence of the prosecution to that of the defence.

N K C

K. V. Ramaseshan for Petitioner.

A. S. Sivakaminathan for the Public Prosecutor (*V. L. Ethiraj*) for the Crown.

K.S.

Mockett and Happell, JJ. Chevveti Ramudu, *In re.*
14th July, 1942. **R.T. No. 88 of 1942.**

Criminal Trial—Offence of murder—Accused of or above sixteen years of age—If ground for commuting sentence of death.

There is no provision of law that sentence of death shall not be passed on a person of or above sixteen years of age. S. 22 of the Madras Children Act porvides that no 'child' (that is a person of or under fourteen years of age) shall be sentenced to death. A sentence of death cannot be commuted in the absence of mitigating circumstances purely on the ground of the young age of the accused. To do so will be to extend the scope of the Children Act beyond the age contemplated by the legislature. The prerogative of mercy in individual cases lies with the Provincial Government and it is for the Legislature to amend the Children Act, if an amendment seems required and to fix the age limit below which sentence of death shall not be passed.

S. Suryaprakasam for Accused.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

K.S.

Horwill, J. Padmanabha Chetty, *In re.*
16th July, 1942.

Crl.R.C. No. 139 of 1942.
(Crl.R.P. No. 129 of 1942).

Madras Prevention of Adulteration Act (III of 1918), S. 5, Cl. (1) (a) and (b), rr. 28 *and* 29*—Adulteration of butter—Figures given by analyst—Value.*

The Reichart Wollney and Saponification numbers, etc., found on tests by the analyst of sample butter notwithstanding that they are abnormally low, establish beyond reasonable doubt that they are inconsistent with the purity of the sample. Abnormality in the Reichart Wollney numbers does not necessarily mean adulteration.

V. Rajagopala Mudaliar for Accused.

The Crown Prosecutor (*P. Govinda Menon*) on behalf of the Crown.

K.S.

Horwill, J. Varadaraja Padayachi, *In re.*
17th July, 1942. **Cr.R.C. No. 227 of 1942.**
(Case Referred No. 13 of 1942).

Criminal Procedure Code (V of 1898), S. 562—Not to be applied to persons over 21 *years of age in relation to offences punishable with sentences exceeding seven years.*

If S. 562 of the Criminal Procedure Code is to be applied to persons over 21 years of age it must be only in relation to offences that are punishable with sentences not exceeding seven years. Where a person over 21 years of age is found guilty of house breaking as well as of theft in a building, S. 454 of the Penal Code requires a sentence of imprisonment to be given and an order under S. 562 of the Criminal Procedure Code cannot be passed.

A. S. Sivakaminathan for Accused.

K. Venkataraghavachari for the Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Byers, J. Albuquerque *v.* The Catholic Bank, Ltd.,
29th June, 1942. Mangalore and others.
S.A. No. 1173 of 1940.

Company—Banking company—Provision in articles of association that office of director shall ipso facto *be vacated "if he becomes incapable of acting as a director"—Default of director in repaying loan to bank—If incapacitates him.*

One of the articles of association of a banking company declared that the office of a director shall be vacated "if he resigns or for any other reason becomes incapable of acting as a director". In the case of a director who had defaulted in repaying a loan to the bank,

Held, that, the exclusion of the new S. 86-D (1) of the Indian Companies Act from banking companies under Cl. (3) of the same section makes it clear that loans to directors of a bank are contemplated as part of its business and it cannot be said that indebtedness to the bank would incapacitate a director. The article contemplates some incapacity such as illness, long absence, imprisonment, insanity or any other incapacity.

R. Rajeswara Rao and *Messrs. John* and *Row* for Appellant.

B. Sitarama Rao and *S. J. S. Fernandez* for Respondents.

K.S.

[F.B.]

The Chief Justice, Lakshmana Rao and Krishnaswami Ayyangar, JJ.
6th July, 1942.

Palani Pillai and others *v.* Anyath Ibrahim Rowther and another.
S.A. No. 753 of 1940.

Limitation Act (IX of 1908), *Art.* 144—*Applicability—Usufructuary mortgage of some items of property by some members of a Muhammadan family—Mortgagee entering into possession of mortgaged items—Limitation and adverse possession against other co-owners—Commencement.*

Where some co-owners usufructuarily mortgage specific items of property held by the members of a Muhammadan family and the mortgagee enters into possession of the mortgaged items under his mortgage-deed, a suit to recover their share therein is barred by Art. 144 of the Limitation Act at the end of twelve years of such possession and adverse possession as against the other members cannot be said to begin only from the date of ouster to their knowledge.

K. S. Sankara Aiyar for Appellants.

S. Rangachari for Respondents.

K.S.

Mockett and Happell, JJ.
22nd July, 1942.

Manolachandu, *In re.*
R.T. No. 94 of 1942.

Criminal Trial—Evidence of witness tallying in the main with accused's statement but trying to exculpate deponent and inculpate only the accused—Value of evidence.

Where the evidence of a witness tallies in the main with the accused's statement but tries to exculpate the deponent and inculpate only the accused and differs from the accused's statement to that extent, his evidence could not be taken into consideration under S. 30 of the Evidence Act, as against a co-accused if the witness had stood in the dock with the accused. The evidence therefore cannot be relied on as corroborating the statement of the accused though the witness was not on his trial.

M. Srinivasa Rao for Accused.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

K.S.

Horwill, J.
24th July, 1942.

Pedda Kambi Reddy, *In re* and others.
Cr. R. C. No. 266 of 1942.
(Cr. R. P. No. 252 of 1942.)

Criminal Procedure Code (V of 1898), *S.* 349—*Sub-Magistrate finding that accused ought to be dealt with in a manner beyond his own powers*

referring case to Joint Magistrate—Procedure to be followed by Joint Magistrate.

A Sub-Magistrate, being of opinion that the accused ought to be dealt with in a manner beyond his own powers, acted under S. 349 of the Code of Criminal Procedure and referred the case to the Joint Magistrate having jurisdiction. On the question of procedure to be followed by the Joint Magistrate,

Held, the case, after the reference to him, was a continuation of the original trial; and the accused had the same rights as they had before the reference. The Joint Magistrate was under the same obligation to hear arguments from the pleaders present and to write a judgment giving his reasons for his order as in an ordinary calendar case tried entirely by him. A judgment prefixing the order with the words "The facts of the case are stated below in the words of the Sub-Magistrate," then embodying the Sub-Magistrate's order verbatim and adding at the end "I am of opinion that a bond for keeping the peace should be taken from them. I order all the accused under S. 106 (1), Cr. P. Code, to execute a bond"—is not a proper judgment and must be set aside.

A. Bhujanga Rao for Petitioners.

A. S. Sivakaminathan for the Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

[F.B.]

The Chief Justice, Lakshmana Rao and Krishnaswami Ayyangar, JJ.
28th July, 1942.

Nori Rama Sastrulu *v.* Teluguntla Balakrishna Rao and another.
L.P.A. No. 47 of 1940.

Provincial Insolvency Act (V of 1920), S. 28 (2)—Vesting—Insolvency of manager of joint Hindu family—Manager's power of sale over joint family properties—Does not vest in Official Receiver—Need for intervention of Central Legislature to bring the provisions of the Provincial Act in conformity with S. 52 of the Presidency Towns Insolvency Act.

Under the Provincial Insolvency Act on the adjudication as insolvent of the manager of a joint Hindu family his power of sale over the joint family property does not vest in the Official Receiver as the power cannot be regarded as "property". Such power vests only under S. 52 of the Presidency Towns Insolvency Act which has no counterpart in the Provincial Act.

The desirability of intervention of the Central Legislature to bring the two Acts into line pointed out.

K. Rajah Aiyar and *A. Venkatachalam* for Appellant.

V. Govindarajachari and *P. Satyanarayana Rao* for Respondents.

K.S.

Horwill, J.
30th July, 1942.

Appanna and others, *In re.*
Crl. R. C. No. 237 of 1942.
(Crl. R. P. No. 223 of 1942.)

Criminal Trial—Bench consisting of three Magistrates—Necessity for all of them to sit throughout, hear evidence and sign the judgment.

Where a Bench consisted of three Magistrates and those three Magistrates did not sit throughout,

Held: When the three Magistrates were not sitting the Bench was not legally constituted and it is necessary that the same Magistrates should sit throughout, hear all the evidence, and sign the judgment.

S. Suryaprakasam for Accused.

S. Vepa for Complainant.

K. V. Chari for the Public Prosecutor (*V. L. Ethiraj*) for the Crown.

K.S.

Horwill, J. Narayanaswami *v.* Sriranganaikulu.
3rd July, 1942. C.R.P. No. 342 of 1942.

Civil Procedure Code (V of 1908), O. 47, r. 9—Review application precluded by—Court has no inherent jurisdiction under sections 149 *and* 151 *to grant review.*

The Court has no inherent power to grant a review under sections 149 and 151 of the Civil Procedure Code. Accordingly where it is found that O. 47, r. 9 did not permit of a review, the Court has no jurisdiction to allow a review application on the ground that it is a hard case.

P. Suryanarayana for Petitioner.

K. Bhimasankaram for Respondent.

K. S.

Horwill, J. Ramalingayya, *In re.* Petr.
10th July, 1942. Crl.R.C. No. 214 of 1942.
(Crl.R.P. No. 201 of 1942).

Defence of India Rules (1939)—*r.* 19 (1) (a) *and* (5)—*Sending by post to a destination outside British India a letter containing a Code for secretly conveying information—Interception of letter by censor—If makes it "not sent"—Secret Code—Tests—Criminal trial—Sentence—Imprisonment till rising of Court—Propriety.*

In a prosecution for an offence punishable under r. 19 (1) (*a*) and (5) of the Defence of India Rules of sending by post to a destination outside British India a "Code" for being used as a means of secretly conveying information it was contended *inter alia* that as the letter was intercepted by the censor the letter could not be deemed to be sent.

Held, that the article "is sent", if it is started on its way to its destination. The fact that it did not arrive at its destination cannot alter the fact that it was sent.

A "Code" does not cease to be a secret Code, because a number of other persons are using it, if it is not generally known or used by persons engaged in the business for which the Code in question is employed.

Even in cases where the alternative of fine is not permissible by law, it is objectionable to sentence persons to imprisonment till the rising of the Court; because it is not a form of imprisonment recognised by law, and it is used to circumvent the provisions of law that require a sentence of imprisonment in jail for a particular term. Where the law permits of a sentence of fine as an alternative, there is no need for a sentence of imprisonment at all if it is thought that the offence does not merit it.

K. Umamaheswaram for Petitioner.

K. Venkataraghavachari for the Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K. S.

Horwill, J. Appalaswamy and another, Accused.
29th July, 1942. Crl.R.C. No. 206 of 1942.
(Crl.R.P. No. 203 of 1942).

Defence of India Rules (1939), *rr.* 35 (4) *and* 38 (5)—*"Prejudicial Act"—Bringing about strike by workers of mill to redress grievance—Knowledge that war work would be impeded—If makes the strike a prejudicial act "without lawful excuse."*

Where the motive for the calling of a strike was to remedy what the accused and others considered to be an arbitrary exercise of the employer's power of dismissal without a fair inquiry and without giving a reasonable warning to a worker and there was no other method of redressing their grievance except by going on strike, it must be held that they had a "lawful excuse" for the strike even though the accused knew that as a result of the strike essential war work would be impeded.

C. V. Dikshitulu for *B. Jagannadha Das* for Petitioners.

K. Venkataraghavachari for the Public Prosecutor (*V. L. Ethiraj*) for the Crown.

K. S.

NRC

Horwill, J.
29th July, 1942.

Chellappa Chettiar and others, Accused.
Crl. R. C. No. 314 of 1942.
(Case Referred No. 28 of 1942.)

Criminal Procedure Code (V of 1898), *S.* 528 (2)—*Case beyond jurisdiction of Sub-Magistrate—Power of District Magistrate to transfer—Exercise of—Procedure.*

The District Magistrate has as much power to transfer under S. 528 (2) of the Code of Criminal Procedure as the High Court has under S. 526. But neither the District Magistrate nor the High Court ought to transfer a case where the Subordinate Magistrate has no jurisdiction, the proper procedure in such a case being for the Sub-Magistrate to return the complaint stating that he may present the same to the Court having jurisdiction. The tribunal to decide whether the case is one within his jurisdiction and whether or not he should continue the trial is the Sub-Magistrate himself and not the District Magistrate or the High Court. It is always open to the Sub-Magistrate to try a case for a lesser offence than that disclosed in the complaint.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

G. N. Chari for Accused.

K.S.

Horwill, J.,
5th August, 1942.

Abdur Shukur Sahib, *In re.*
Crl.R.C. No. 370 of 1942.
(Crl.R.P. No.360 of 1942).

Criminal Trial—Complaint of preferring false or frivolous charge against police officers by letter to the District Superintendent of Police—Complaint to be filed where letter is received and not where it was posted.

The accused sent a petition to the District Superintendent of Police North Arcot containing various allegations against the police officials at Polur which were subsequently found to be false. The letter was posted at Polur and opened by the District Superintendent of Police at Vellore. In a complaint against the accused filed by the Police at Polur for preferring a false or frivolous charge against them,

Held, that the post office acted as the agent of the accused in carrying the letter to the District Superintendent of Police and the effect is the same as if the accused had handed over the letter in person at Vellore. The false or frivolous charge was therefore made at Vellore and not at Polur and the Magistrate having jurisdiction to entertain the complaint would be the Magistrate at Vellore.

A. S. Sivakaminathan for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

K. S.

Horwill, J.
6th August, 1942.

Makky Moithu and others, Accused.
Crl.R.C. No. 212 of 1942.
(Crl.R.P. No. 199 of 1942).

Evidence Act (I of 1872), *section* 124—*Scope and applicability.*

In a prosecution for cutting trees and taking them away from the Government forest, on the question whether a certain report made by the Deputy Tahsildar in charge of the forest in question to the Collector was privileged,

Held, that section 124 of the Indian Evidence Act, leaves it to the Court to consider whether the communication was of the nature covered by the section (communications made in official confidence). If it is, the Court has to exclude the document if the Public Officer concerned considers that the public interests will suffer by the disclosure. The Court cannot question his decision on that point.

P. S. Narayanaswami Aiyar for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K. S.

Horwill, J.
30th July, 1942.

Rangaswami Naidu and another, *In re.*
Crl.R.C. No. 275 of 1942.
(Crl.R.P. No. 261 of 1942).

Criminal Procedure Code (V of 1898), *section* 107—*Security proceedings—Evidence of charge subject of a current trial—Admissibility.*

There is no illegality in admitting evidence in security proceedings of a specific charge which is the subject of a current trial. The scope of the two proceedings is entirely different, one being concerned with offences committed in the past and the other being concerned with the likelihood of a breach of the peace in the future. If the same evidence is relevant to both proceedings it can be used in both those proceedings.

28 Cr.L.J. 515 and 88 I.C. 362, relied on.

N. S. Mani for Petitioners.

K. Venkataraghavachari for the Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Horwill, J.
4th August, 1942.

Krishna Reddi *v.* Muniappa Reddi and others.
Crl.R.C. No. 256 of 1942.
(Crl.R.P. No. 242 of 1942).

Penal Code (XLV of 1860), *section* 378—*Theft—Fish in pond—When can form the subject of theft.*

As long as water flows in and out of a pond thereby enabling fish to enter and leave it, the fish are free and in a state of nature, and so no more belong to the owner of the pond than a bird that settles on a tree in a person's garden belongs to that person; but when once the water has fallen to such a level that fish cannot leave it then they are trapped and consequently in the possession of the owner of the pond. Then any person who takes fish from that pond without the owner's consent with intent to cause him loss, necessarily commits theft.

I.L.R. 5 Mad. 390 and I.L.R. 24 Mad. 81, distinguished.

1914 M.W.N. 168, I.L.R. 36 Mad. 472 and I.L.R. 51 Mad. 333, followed.

V. C. Viraraghavan for Petitioner.

K. Venkataraghavachari for the Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Horwill, J.
10th August, 1942.

Jayasudeen, *In re.*
Crl.R.C. No. 335 of 1942.
(Crl.R.P. No. 325 of 1942).

Madras Prohibition Act (X of 1937), *section* 3 (17)—*"Spirits"—If means only potable spirits—Spirits mixed with shellac—Introduction into prohibition area—Offence.*

The term "spirits" is defined in section 3 (17) of the Madras Prohibition Act as meaning any liquor containing alcohol and obtained by distillation (whether it is denatured or not). There is nothing in the Act which suggests that because some substance (*e.g.*, shellac) is mixed with the spirits that makes, it unfit for human consumption it is no longer "spirits." On the contrary, the very wording of section 3 (17) indicates that spirits which are not potable come within the definition of spirits. Even if the transport of such spirits is for industrial purposes a licence is required under section 18 of the Act.

The Attorney-General v. *Bailley,* (1847) 1 Exch. Rep. 281, distinguished.

Accordingly where the accused despatched from the Madras Central Station two drums which on examination on suspicion by the Police at Melpatti station were found to contain denatured spirit with some solid matter which might have been shellac and resin, he is guilty of an offence under section 4 (1) (*a*) of the Madras Prohibition Act.

S. Narayana Aiyangar for Accused.

C. D. Venkataraman for the Crown Prosecutor (*P. Govinda Menon*) on behalf of the Crown.

K.S.

N R C

Horwill, J. Kamakshi Naidu, *In re.*
11th August, 1942. Crl.R.C. No. 316 of 1942.
(Crl.R.P. No. 307 of 1942).

Evidence Act (I of 1872), *sections* 25 *and* 27—*Confession by accused as to criminal breach of trust outside the one for which he was under arrest —Admissibility.*

Section 25 to which section 27 of the Evidence Act is a proviso applies equally to confessions with regard to offences not under investigation as with regard to offences under investigation. Where a person while under custody for a criminal breach of trust in respect of a cycle that he had taken on hire and then sold, confessed that he had similarly sold another cycle and as a result of that confession that cycle was discovered, the confession is admissible on the plain words of section 27 of the Evidence Act.

I.L.R. (1937) Mad. 358 and 61 M.L.J. 860, referred to.

N. S. Mani for Petitioner.

A. S. Sivakaminathan for the Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Kunhi Raman, J. Subbaraman *v.* Perianna Chetti.
14th August, 1942. S.A. No. 758 of 1940.

Practice—False description of plaintiff as minor in a suit to have sale deed by plaintiff declared void as obtained by fraud and without consideration—Proper procedure.

In a suit by a next friend of a plaintiff falsely described as a minor praying that a sale deed executed by the plaintiff was void as obtained by fraud and without consideration,

Held, the plaintiff's case did not rest mainly upon the allegation of minority as in the case in (1940) 1 M.L.J. 337 in which case there might have been justification for holding that a discretion ought not to be exercised in favour of the plaintiff who had intentionally made incorrect statements about his age in the plaint. In the instant case the plaintiff had also relied upon fraud and absence of consideration in support of his case that the sale deed executed by him was not enforceable in law. When such an alternative case was set forth in the plaint it was incumbent upon the Court to consider that aspect of the case as well and the suit in the special circumstances of the case ought not to be dismissed on the technical ground that it was not maintainable because of the false description of the plaintiff as a minor in the plaint.

C. S. Venkatachariar for Appellant.

B. Sitarama Rao and *M. S. Ramachandra Rao* for *A. Bujanga Rao* and *D. R. Krishna Rao* for Respondent.

K.S.

Horwill, J. Krishanlal Roopchand and Company, *In re.*
17th August, 1942. Crl. App. No. 329 of 1942.

War Risks (Goods) Insurance Ordinance (IX of 1940), *section* 7—*Construction—Firm if 'person' liable for failure to insure goods.*

Any firm, registered or not, would be a 'person' within the meaning of the General Clauses Act, section 3 (39) and it cannot mean that the Government intended under the War Risks (Goods) Insurance Ordinance, section 7, that only private individuals carrying on business in their individual capacity should insure their goods. Accordingly, it is incumbent on 'firms' as well as private individuals trading as such to insure their goods under section 7 of the War Risks (Goods) Insurance Ordinance.

The use of the word "person" or "firm" in section 6 cannot affect the position.

A. Nagarajan for Accused.

The Crown Prosecutor (*P. Govinda Menon*) on behalf of the Crown.

K.S.

King and Kunhi Raman, JJ.
14th August, 1942.

Basavayya *v.* Raghavayya.
Appeal No. 213 of 1941.

Limitation Act (IX of 1908), *section* 14—*Scope and applicability—Petition by payee under promissory note for adjudication of maker an insolvent—Hearing of petition and dismissal on merits—Subsequent suit on promissory note—Section* 14 *of Limitation Act not applicable to save limitation.*

A promissory note was in favour of the plaintiff executed in 1929 by the first defendant against whom in February, 1932, the plaintiff filed an insolvency petition which remained pending for nearly eight years and was finally dismissed in December, 1939. In August, 1940, the plaintiff brought a suit on the promissory note, contending that the suit fell within the provisions of section 14 of the Limitation Act. The reason why the insolvency petition was dismissed was that the plaintiff charged the first defendant with having alienated the greater part of his property in order fraudulently to prefer certain creditors and to defeat the interests of others and it was finally held that the alienations did not amount to any such fraudulent preference. On the facts of the instant case,

Held, that section 14 of the Limitation Act cannot be of any assistance to the plaintiff as the words "unable to entertain it" in that section cannot apply to the action of the Insolvency Court as the petition was heard on the merits.

A.I.R. 1935 Lah. 736 and 1937 M.W.N. 465 distinguished.

The plea of limitation is in no sense an unjust plea and it cannot be said that because a defendant has succeeded on a plea of limitation he should not be granted his costs.

P. Satyanarayana Rao for Appellant.

K. Raghuramiah and *N. V. B. Sankara Rao* for Respondents.

K.S.

Horwill, J.
19th August, 1942.

Chakrapani Chetty & Sons, *In re.*
Crl.R.C. No. 508 of 1942.
(Crl.R.P. No. 487 of 1942).

Opium Act (I of 1878), *section* 11—*Car possessed under hire purchase used for transporting contraband opium and ganja—Confiscation—When proper.*

Where a car in the possession of the accused under a hire purchase agreement was used by him for transporting large quantities of contraband opium and ganja, and the owner had received only one instalment towards the purchase of the car and had no reason to suspect that the car was being used for transporting opium it would be very hard to have the car confiscated. A conveyance ought not to be confiscated unless the owner knew or had reason to believe that his vehicle was likely to be used for such purpose. The discretion of the Magistrate to confiscate a vehicle cannot be questioned in a Civil Court but only by the Courts having appellate or revisional jurisdiction over the Magistrate.

G. Gopalaswami for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

NRC

Horwill, J.
19th August, 1942.

Rangiah—Accused.
Cr.R.C. No. 365 of 1942.
(Cr.R.P. No. 355 of 1942).

Penal Code (XLV of 1860), *sections* 183 *and* 186—*Charge of carrying away property attached by Amin in execution of a Munsiff Court decree—Amin and Nazarat under supervision of Subordinate Judge in the place—Person duly authorised to file complaint.*

Where the charge was that the accused carried away the property which the amin had attached and in other ways obstructed him in executing a decree of the District Munsiff's Court and the amin was under the charge and direction of the Nazir subject to the supervision and control of the Subordinate Judge in that place the amin in the particular case is not subordinate to the District Munsiff. The complaint could be filed by the amin himself or by the Nazir or the Subordinate Judge or any of the superiors of the Subordinate Judge, but not by the District Munsiff.

B. Lakshminarayana for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Wadsworth, J.
27th August, 1942.

Nataraja Gramany *v.* Sivakolundu Gramany.
C.R.P. No. 1552 of 1940.

Madras Agriculturists' Relief Act (IV of 1938), *sections* 20 *and* 19—*Stay under*—Ad interim *stay followed by an absolute order—Not permissible—Starting point of limitation for filing application under section* 19.

The procedure of an executing Court in granting an *ad interim* stay followed by an absolute order is not contemplated by section 20 of Act IV of 1938; when once a stay has been granted limitation for an application under section 19 will begin to run.

However, the order of the lower Court proceeding on a different view of the limitation question is not one without jurisdiction and therefore cannot be interfered with in revision.

R. Thirumalai Thathachariar for Petitioner.

M. Ranganatha Sastriar for Respondent.

K.S.

Horwill, J.
31*st August,* 1942.

Abdul Salam Rowther, *In re.*
Crl.R.C. No. 362 of 1942.
(Cr.R.P. No. 352 of 1942).

Motor Vehicles Act (IV of 1939), *section* 42—*"Use" and "permit the driver to use"—Construction.*

Section 42 (1) of the Motor Vehicles Act is general and prohibits the use of the transport vehicle in a public place save in accordance with the conditions of a permit granted or countersigned by proper authority. Where a driver took a car to convey himself to the Magistrate's Court—where he was being tried for driving without a licence—and back again he was certainly "using" the vehicle. But the owner of the vehicle cannot be said to have "permitted" the use of the vehicle. Mere negligence of the owner in not locking up his vehicle so that the driver could not take it, would not amount to "permitting" the use of the car.

John and *Row* for Petitioner.

K. Venkataraghavachari for the Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Abdur Rahman, J.
31*st August,* 1942.

Muniswami Reddi *v.* The Official Receiver, North Arcot.
A.A.A.O. No. 311 of 1941.

Provincial Insolvency Act (V of 1920), *section* 51 (1)—*"Benefit of execution"—Money paid under orders of Court—If can be retained by creditor—Dismissal of application for adjudication for default—Restoration—Permissibility.*

After an execution sale money was deposited in Court on 11th December, 1934. A creditor filed a petition for adjudication of the judgment-debtor as insolvent on 5th December, 1934, and an interim receiver was appointed. The executing Court passed an order that the sale proceeds of the judgment-debtor's property should remain in Court until final disposal of the insolvency petition. The insolvency petition was dismissed for default on the 12th July, 1935, and the executing decree-holder obtained an order for payment of the sale proceeds to him. The decree-holder got Rs. 1,490-11-4 from the execution Court on 7th August, 1935. An application for restoration of the insolvency petition had been made in the meantime and was accepted on the 4th November, 1935. The debtor was adjudged an insolvent on the 6th October, 1937, and the Official Receiver applied under section 4 of the Provincial Insolvency Act for the refund of the Rs. 1,490-11-4.

Held, the application was not one for setting aside the order of the executing Court but merely for the refund of the benefit of the execution

N.R.C.

which the creditor was not entitled to retain. This the Insolvency Court has jurisdiction to determine under section 4 of the Act. The fact that the decree-holder obtained payment under orders of Court is immaterial and the money must be refunded. Though there is no provision as to restoration, an application for restoration can be made to the Insolvency Court in accordance with the provisions of section 5 of the Provincial Insolvency Act.

T. L. Venkatarama Aiyar for Appellant.

N. R. Sesha Aiyar for Respondent.

K.S.

King and Kuppuswami Ayyar, JJ.
1st September, 1942.

Examiner of Local Fund Accounts, Madras *v.* C. Subramania Mudaliar and others.
C.M.A. Nos. 127 and 128 of 1941.

Madras District Municipalities Act (V of 1920), *Schedule IV, rule* 62—*Right of appeal against order of District Judge—If retrospective.*

The right of appeal created by the new rule 62 of Schedule IV of Madras Act V of 1920 against an order of the District Court to set aside a surcharge order will not affect orders passed on petitions instituted before the rule came into force (July, 1939), though the order on such petition was passed later.

The right of a litigant to have a decision of a Court as final and not open to appeal is a substantive right existing at the time of the institution of the proceedings and cannot be taken away by later enactments or rules unless such an enactment or rule is given retrospective operation either expressly or by necessary intendment.

I.L.R. 52 Mad. 261 (F.B.) followed.

The Government Pleader (*K. Kuttikrishna Menon*) for Appellant.

S. Panchapagesa Sastri for Respondents.

K.S.

The Chief Justice and Lakshmana Rao, J.
18th September, 1942.

The Asiatic Government Security Life Assurance Co., Ltd., Bangalore *v.* The Debt Conciliation Board, Erode and another.
C.M.P. No. 1800 of 1942.

Madras Debt Conciliation Act (XI of 1936), *section* 9—*Proper procedure.*

Under section 9 of the Debt Conciliation Act the Debt Conciliation Board has power at any stage to dismiss an application, if it considers that it is not desirable or practicable to effect a settlement. Where a creditor made it clear to the Board that a settlement was not practicable, the Board instead of applying section 9 and dismissing the application directed on 12th February, 1942, a notice to issue under section 10 (1) requiring creditors to submit their statements by 14th May, 1942.

Held, that the Board should not have done so as it was merely helping the debtor in delaying the payment of moneys he owed. Nor was the Board justified in adjourning the case further to 16th June, 1942 and again to 29th July, 1942. The duty of the Board was to dismiss the petition when there was no hope of settlement.

V. Rajagopalachari for Petitioner.

N. Somasundaram for 2nd Respondent.

K.S.

Horwill, J. Krishnan *v.* Krishnan.
12th August, 1942. **C.R.P. No. 2768 of 1941.**

Madras Debt Conciliation Act (*XI of* 1936), *section* 14 (2)—*Agreement between decree-holder and judgment-debtor—Effect on decree—Attaching decree-holder of the decree—Right to execute decree despite the agreement.*

X applied on 6th November, 1939, to attach a decree obtained by a person *A* against *B*. Five days later *B* filed an application under the Debt Conciliation Act and notice was ordered to the decree-holder *A*. On 20th December, 1939, the attachment was ordered. On 22nd January, 1941, an agreement was entered into between *A* and *B* under section 14 (1) of the Debt Conciliation Act and duly registered whereby the debt of *A* was considerably reduced. When *X* put in an application to execute the attached decree,

Held: Though the agreement under section 14 (1) when registered takes effect as if it were a decree of a Civil Court and is executable as such, it does not supersede the decree obtained by the creditor in the Civil Court. The decree-holder *A* cannot execute because he would be met by the plea that he had entered into an agreement with the judgment-debtor *B* that he would receive a lesser amount. But such an agreement only binds the parties to it, and as such cannot be pleaded in bar of execution by *X* the attaching decree-holder.

K. N. Kumaran for Petitioner.

A. Atchuthan Nambiar for Respondent.

K.S.

Horwill, J. Narasinga Rao (Receiver) *v.* Rangayya and another.
27th August, 1942. **C.R.P. No. 701 of 1941.**

Limitation Act (*IX of* 1908), *sections* 19 *and* 20—*Open payment endorsed on promissory note not sufficient to save from bar of limitation—Endorsement not stating that payment was made towards the debt—If can serve as written acknowledgment under section* 19.

When the indorsement on a promissory note was "amount paid in cash (a specified date) is so much only" section 20 of the Limitation Act did not save a suit on the promissory note from the bar of limitation. Nor can the bare statement of payment in the indorsement serve as an acknowledgment of the debt under section 19. If limitation is to be saved under section 19, one must be able to read into an indorsement not merely that a payment has been made but that a further sum is admitted to be due.

A.I.R. 1939 Bom. 252, distinguished.

A decree cannot be said to be a consent decree merely because the defendants remained *ex parte*; it can be a consent decree only if the defendants appear and admit the claim.

(1920) L.R. 47 I.A. 200, distinguished.

B. V. Ramanarasu for Petitioner.

Respondent not represented.

K.S.

Horwill, J. Arumuga Thevar, *In re.*
31st August, 1942. **Crl. R. C. No. 417 of 1942.**
(Cr.R.P. No. 404 of 1942.)

Criminal Procedure Code (*V of* 1898), *section* 106—*Order for executing bond for keeping peace—Tacking on to conviction for petty offences—Propriety.*

It is generally undesirable where a person is charged with some petty offence, to tack on to some small sentence of fine an order under section 106 of the Criminal Procedure Code which in most cases in view of the poverty of the accused persons would necessitate their remaining in jail for a long period which very much exceeded the punishment legally permissible for the offence of which the accused were charged. An order under section 106 is of course legally permissible but should be used very sparingly in such cases. Before passing an order under section 106 the Magistrate should be satisfied on legal evidence that it is necessary to require the accused person to execute a bond for keeping the peace. The

period for which the bond is to be executed must be in proportion to the gravity of the offence committed.

V. T. Rangaswami Aiyangar for Petitioner.

K. Venkataraghavachari for the Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

King, J. Varadaramanjulu Naidu *v.* Kaunanoor Naidu.
21st September, 1942. **A.A.O. No. 241 of 1941.**

Criminal Procedure Code (V of 1898), *section* 195—*Registrar of Presidency Small Cause Court—When a "Court" which can file a complaint under sections* 193 *and* 199 *of the Penal Code.*

For the purposes of section 195 of the Code of Criminal Procedure, the Registrar of the Presidency Small Cause Court can never be deemed to be a "Court" unless he has been in some way or other specially empowered to be a Judge. Accordingly when the Registrar takes security and in order to do so incidentally takes from a party an affidavit the Registrar cannot be said to be acting as a Court and he cannot file a valid complaint against the party under section 195, Criminal Procedure Code for an offence under sections 193 and 199 of the Penal Code in connection with a false statement that a certain house was his own property alleged to have been made in the affidavit.

V. Rajagopala Mudaliar for Appellant.

Srinivasaraghavan for Respondent.

K.S.

King, J. Kadir Hussain Rowther and others *v.* Jamila Bi and another.
23rd September, 1942. **C.R.P. No. 410 of 1942.**

Practice—Suit to obtain share of deceased's estate—Value for purposes of jurisdiction and appeal.

Though the primary object of a suit by a co-heir is to obtain her own share of the deceased's estate the suit must be regarded as a suit for the administration of that estate. A decree in such a suit must necessarily affect the value of the whole estate. Accordingly where the value of the estate is Rs. 41,000 though the value of the plaintiff's share will come to less than Rs. 5,000, an appeal from a decree in such a suit must be filed in the High Court and not in the District Court.

(1926) I.L.R. 50 M. 646, applied.

(1929) 56 M.L.J. 394, considered.

T. R. Srinivasan for Petitioners.

K. Rajah Aiyar and *V. Seshadri* for Respondents.

K.S.

[F.B.]

The Chief Justice, Lakshmana Rao and Krishnaswami Ayyangar, JJ. Advocate-General, Madras *v.* Ramanatha Goenka.
23rd September, 1942. **Cr.M.P. No. 514 of 1942.**

Contempt—Article in newspaper suggesting in respect of a case decided that there could not be any proper judicial trial—Contempt.

A statement in an article in a newspaper relating to a particular case recited: "The prosecution clearly stated that the case was filed as the result of 'correspondence from Government' but with the blessings of the Magistrate refused to produce the correspondence and the statement had to go untested. Without meaning any disrespect, we doubt whether in any case where opinions count, any Subordinate Magistrate will give a judgment contrary to what he believes the Government of the day has decided. The fate of this case was sealed the minute, the police told the Magistrate that the Government was behind the prosecution."

Held, that this amounted to gross contempt.

The Advocate-General (*Sir A. Krishnaswamy Aiyar*) in person.

B. Sitarama Rao for *V. V. Srinivasa Aiyangar* and *V. C. Gopalaratnam* for Respondent.

K.S.

Wadsworth and Patanjali Sastri, JJ.
15th September, 1942.

Madhurakavi Aiyangar *v.* Chinnasami Chetti & others.
A.A.O. No. 15 of 1941 and C.R.P. No. 651 of 1941.

Madras Agriculturists' Relief Act (IV of 1938), sections 19 and 8—Person taking a mortgage of properties purchased by a puisne mortgagee in discharge of his mortgage after a mortgage decree had been passed in a suit by the first mortgagee—If a "judgment-debtor" entitled to apply for scaling down—Section 8 (2) and (3)—Payments by agriculturists alone to be regarded in applying the section—Sale in execution without applying Act IV of 1938—If material irregularity under Order 21, rule 90 of the Civil Procedure Code.

On a mortgage of 1913 there was a final decree in 1919. The 7th defendant was a puisne mortgagee who subsequently purchased part of the property in discharge of his own mortgage. In 1929 a portion of the mortgaged property was sold in execution of the decree. In 1932 after *Y* had been recognised as the assignee decree-holder, the second lot was proclaimed for sale. Then the 7th defendant put forward an uncertified adjustment of the mortgage decree and claimed that the decree was satisfied except for a small amount. This application was eventually withdrawn in 1936. In April, 1937, the 7th defendant mortgaged certain items of the property purchased by him to *A* and died shortly thereafter. In July, 1937, a fresh proclamation was made and in August, 1938, a further portion of the hypotheca was sold and the sale confirmed. Then in April, 1939, the properties of which *A* was the mortgagee were brought to sale under the mortgage decree and purchased by the assignee decree-holder and before the confirmation of the sale *A* filed an application under section 47 and Order 21, rule 90 of the Civil Procedure Code to set aside the sale for material irregularity and another application under section 19 of Madras Act IV of 1938 for scaling down the mortgage decree on the footing that *A* was an agriculturist judgment-debtor entitled to the benefits of the Act in respect of the decree. In the circumstances,

Held: (*i*) The mere holding of the sale by the assignee decree-holder without first applying Act IV in favour of a person like *A* interested in the hypotheca would not amount to a material irregularity such as would justify the setting aside of the sale.

(*ii*) Though *A* had acquired an interest in the property bound by the mortgage decree long after the decree had been passed, he having acquired it before the 1st October, 1937, became liable to discharge the debt which bound the property and must be deemed to be a "judgment-debtor" entitled to apply under section 19 of Act IV of 1938 for scaling down the decree debt, if he is an agriculturist.

(*iii*) Section 8 (2) and the complementary section 8 (3) of Act IV of 1938 both deal only with the effect of payments by an agriculturist and in scaling down the debt regard will have to be had to the question whether any of the payments towards the debt were made by an agriculturist. The decision of this question will be affected by the date of death of any person who had made payments.

S. V. Venugopalachari for Appellant.

N. Rangachari for Respondent.

K.S.

Patanjali Sastri, J.
23rd September, 1942.

Paramasiva Udayar *v.* Muthuveera Mudaliar and others.
A.A.A.O. Nos. 233 and 234 of 1941.

Practice—Appeal—Order though in form purporting to be one settling sale proclamation, clearly adjudicating on rights of parties as affected by scaling down of decree under Madras Act IV of 1938—Appealability.

Where the order of the first Court though in form one purporting to settle the terms of a sale proclamation clearly adjudicates on the rights of parties as affected by the scaling down of the decree under Madras Act IV of 1938, an appeal against the order is clearly maintainable.

M. S. Vaidyanatha Aiyar for Petitioner.

A. V. Narayanaswami Aiyar for Respondent.

K. S.

Abdur Rahman, J.
2nd October, 1942.

Ananthakrishna Baliga, Petitioner.

C.M.P. Nos. 2026, 2028, 2030 and 2032 of 1942.

Civil Procedure Code (V of 1908), Order 33, rule 1 and Order 44—If applicable to applications for review by defendants or respondents in appeal.

In an application by the respondent in a batch of appeals for review of the judgment in *forma pauperis,*

Held: There is nothing in Order 33 of the Civil Procedure Code, which can help a defendant in asking for the indulgence granted to persons who wish to file suits in *forma pauperis* except perhaps in cases where he (*i.e.*, the defendant) is, for the purposes of the suit to be regarded as a plaintiff. The words of Order 33, rule 1, are unambiguous and cannot be construed so as to cover a defendant or a defence. 5 Cal. 819 not followed.

The Court possesses no powers to exempt a defendant or a respondent from paying the necessary Court-fee, even temporarily when they are required to pay the same at the time when proceedings are initiated by them except perhaps when they really stand in the position of a plaintiff or an appellant.

A petition for review cannot be regarded to be in the nature of a continuation of the suit.

There is no procedure which will entitle a Court to make an enquiry in regard to a respondent's *pauperism* after the appeal in regard to which he is making an application for review has been brought to a close.

P. G. Krishna Aiyar for Petitioner.

The Government Pleader (*K. Kuttikrishna Menon*) for the Crown.

K.S.

King, J.
2nd October, 1942.

Haji Kadir Murthuza Hussain *v.* Mohamad Murthuza Hussain.

C.R.P. No. 2753 of 1941.

Mussalman Wakf Validating Act (VI of 1913), section 3—Wakfs validated under—Application under Act (XLII of 1923), sections 3, 5 and 10—When maintainable in respect of wakfs.

The words "for the maintenance and support wholly or partially of his family and children or descendants" in section 3 of Act VI of 1913, describe two possible sizes of wakfs, the first one being sufficiently large to maintain the family completely and the second one being insufficiently large for this purpose. The wakfs which are validated are those which are primarily and wholly for the purpose of supporting and maintaining the family, children or descendants of the creator of the wakf. All that the Act requires is that in case the family should one day become extinct there should be a provision in the wakf for the benefit of some religious, pious or charitable purpose.

Accordingly a petition to the District Judge under sections 3, 5 and 10 of Act XLII of 1923 is maintainable in respect of a wakf which subserves two purposes, partly charitable and partly private.

M. S. Venkatarama Aiyar for Petitioner.

C. Krishnamachariar for Respondent.

K. S.

Kuppuswami Ayyar, J. Marimuthu Pillai *v.* Province of Madras.
1st October, 1942. **S.A. No. 456 of 1941.**

Madras Irrigation Cess Act (VII of 1865), *section* 1 (b)—*Irrigation with water from tank fed by Government channel—Right of Government to levy cess.*

Certain lands were irrigated from a tank or *Kuttai* formed in patta land. But the Government claimed, that water flowing through a channel belonging to the Government being the main source of water supply to the tank, the Government was entitled to levy irrigation cess under section 1 (*b*) of the Madras Irrigation Cess Act.

Held, that the Government was entitled to levy the cess.

(1940) 1 M.L.J. 152, distinguished.

T. V. Muthukrishna Aiyar for Appellant.

The Government Pleader (*K. Kuttikrishna Menon*) for Respondent.

K. S.

King, J. Vellayappan *v.* Palaniappa Chettiar.
2nd October, 1942. **C.R.P. No. 1253 of 1941.**

Civil Procedure Code (V of 1908), *sections* 47 *and* 73—*Scope.*

V, a member of a joint family, filed a suit in 1936, against his father and other members of the joint family and the Official Receiver of Rangoon, who represented his father's estate claiming to succeed to property which had belonged to his mother. A decree was given establishing this claim. *P,* a stranger had obtained a decree in a suit in Rangoon filed in 1921 against the same joint family in which *V* happened to be impleaded by name as well as his father. Monies were realised in execution of the decree in *P's* suit of 1921 in proceedings which had been transferred to Devakottai and *V* applied for rateable distribution.

The Subordinate Judge held that because *V* was himself a judgment-debtor in *P's* suit, he had no *locus standi* to apply for rateable distribution of any assets realised in execution of that decree. On revision,

Held, (1) Sections 73 and 47 of the Civil Procedure Code are mutually exclusive and in making his application under section 73, *V* must be deemed to be acting in his capacity as decree-holder in his own suit and cannot possibly be deemed to be acting in the capacity of a member of the joint family. Accordingly the revision petition cannot be rejected on the ground that *V's* only remedy was by way of appeal.

(2) On the merits both *V* and *P* having each obtained decrees against the fund or estate one must have a right to rateable distribution against the other. The fact that one of them was a judgment-debtor in the other suit is irrelevant.

T. M. Krishnaswami Aiyar and *M. S. Vaidyanatha Aiyar* for Petitioner.

V. Ramaswami Aiyar for Respondent.

K. S.

Kuppuswami Ayyar, J. Varalakshmamma *v.* Jannayya.
7th October, 1942. **C.M.S.A. No. 260 of 1940 and C.R.P. No. 2065 of 1940.**

Civil Procedure Code (V of 1908), *Order* 21, *rules* 84 *and* 85—*Decree-holder auction-purchaser—If bound to pay within* 15 *days from date of sale the amount payable rateably to other creditors out of the sale proceeds.*

Under rules 84 and 85 of Order 21 of the Code of Civil Procedure, it is not the duty of the decree-holder auction-purchaser to pay within 15 days from the date of sale, that portion of the amount that may be payable rateably to the other creditors who may claim a share in the assets realised by the sale over and above the amounts deposited by him into Court representing the difference between the amount for which he purchased the properties and the amount due to him under his decree. Accordingly the Court has no jurisdiction to set aside an execution sale on the ground that the decree-holder

auction-purchaser had not deposited within 15 days of the sale the amount payable to the creditors entitled to rateable distribution.

I.L.R. 59 Mad. 342 and I.L.R. 11 Mad. 356, referred to.

P. Sivaramakrishnayya for Appellant.

A. Lakshmayya and *N. V. B. Sankara Rao* for Respondents.

K. S.

Horwill, J. Koman Nambiar and others *v.*
13th October, 1942. Padmavathi Amma.
A.A.O. No. 472 of 1941.

Promissory note—Execution by a karnavan of a Malabar tarwad—Assignment of note—Enforceability by assignee against tarwad—Principles.

In a suit by the assignee of a promissory note executed by the karnavan of a tarwad,

Held: If it is not clear on the note itself that the karnavan executed it in a representative capacity the holder could only sue the family on the debt and unless that debt was properly assigned and the assignment properly stamped the holder of the note could not sue on the debt. Where however the document is clearly expressed to be in a representative capacity, then the person liable under the promissory note is not the person who executes but the firm or body that he represents; and that same liability would continue even though the promissory note was endorsed to others and an indorsee brought a suit.

P. Govinda Menon for Appellants.

T. Krishna Rao for Respondent.

K. S.

Happell, J. Sreenivasan *v.* Lakshmana Rao Saheb.
15th October, 1942. **C.R.P. No. 1421 of 1941.**

Civil Procedure Code (V of 1908), *Order* 33, *rule* 5 (d)—*Scope.*

An application for permission to sue as a pauper cannot be dismissed or the applicant called upon to pay court-fees merely on the ground that the contention of the respondent, that there was no cause of action, appeared to be tenable and might ultimately prove to be true.

N. Sivaramakrishna Aiyar for Petitioner.

T. P. Ramachandra Aiyar for Respondent.

K. S.

Happell, J. Pachayakkal *v.* Shanmughavelayudasami.
15th October, 1942. **C.R.P. Nos. 2747, etc., of 1941.**

Court-fees—Appeal against decree in redemption suit—Proper Court-fee—Court-Fees Act, section 7, clause (ix) and Article 1 of Schedule I.

If in an appeal against a decree in a suit brought for redemption the appeal relates only to the amount payable and not to the right of redemption, court-fee must be paid *ad valorem* on the amount claimed to be payable. Even where the appeal purports to dispute both the right of redemption and the amount payable if in substance it relates only to the amount payable there again court-fee must be paid *ad valorem* on the amount claimed. But if the right of redemption and the amount payable are disputed in appeal and both grounds are grounds in substance and not merely in form the court-fee payable will be as for a suit under section 7, clause (*ix*) of the Court-Fees Act.

It cannot be said that it is the form alone and not the substance of the appeal which determines the question of court-fees.

M. Krishna Bharathi and *S. Ramachandra Aiyar* for Petitioner.

The Government Pleader (*K. Kuttikrishna Menon*) and *S. S. Ramachandra Aiyar* for Respondent.

K. S.

Happell, J. Lakshmana Reddiar *v.* Ramaswami Reddiar.
8th October, 1942.

C.R.P. No. 1093 of 1941.

Hindu Law—Widow—Borrowing for defence of suit—When for justifiable necessity.

Where a person filed a suit against his brother's widow for the appointment of himself as the receiver of the widow's estate on the ground of waste by her and the widow borrowed money for defending the suit, *Held*: that the litigation from her point of view was one for protecting her right during her lifetime to enjoy and manage the property. The result of the suit was not a matter with which the creditor was concerned and the creditor was entitled to recover from the estate.

V. Sundaresa Aiyar for Petitioner.

K. S. Desikan for Respondent.

K.S.

Kuppuswami Ayyar, J. Trichinopoly Municipal Council *v.* Syed Joshi Muhammad.
12th October, 1942.

A.A.A.O. No. 129 of 1941.

Execution—Return of application—Re-presentation along with subsequent application for execution—Effect on limitation.

A petition for execution cannot be considered to be pending in Court when as a matter of fact it had been returned to the petitioner for being represented by a particular date and he did not choose to do so. Where the petition was not pending in Court not because of the order but because he failed to comply with the order of return which directed him to furnish the sale papers within a particular date and re-present the petition, it cannot give a fresh starting point for a subsequent application for execution.

(1942) 1 M.L.J. 542 and (1942) 1 M.L.J. 1018, referred to.

B. Sitarama Rao for Appellant.

K. Aravamuda Aiyangar for Respondent.

K.S.

Chandrasekhara Ayyar, J. Manikyam *v.* Sambayya.
12th October, 1942.

C.R.P. No. 863 of 1941 etc.

Limitation Act (IX of 1908), section 20. (Proviso as amended)—Acknowledgment in writing signed by debtor—If should be addressed to the creditor.

A writing signed by the debtor constitutes a sufficient acknowledgment for the purposes of the proviso to section 20 of the Limitation Act. The section does not say that it should be a writing addressed by the debtor to the creditor. The earlier authorities which arose on the language of the section as it stood before the proviso was amended are not applicable.

P. Sivaramakrishnayya for Petitioner.

V. Damodara Rao for Respondent.

K.S.

Kuppuswami Ayyar, J. Venkata Reddi and others *v.* Nagi Reddi and others.
13th October, 1942.

S.A. No. 98 of 1941.

Evidence Act (I of 1872), section 35—Reports sent by revenue officials to their superiors—Admissibility in evidence.

In a case where the dispute was whether a channel was one of the sources of supply of water to an irrigation tank, and the reports sent by the village officers during an enquiry held by the Collector on a complaint of the villagers were relied on as evidence not of any opinion expressed by the officers with regard to the rights of parties but as evidence of the state of things as they were at the time the reports were sent, such reports are admissible as relevant evidence.

44 M.L.J. 132, applied.

NRC

33 Mad. 21 and 1936 Lah. 37 (1), distinguished.

S. Venkatesa Aiyangar and *K. Kuppuswami* for Appellants.

M. Ranganatha Sastri and the Government Pleader (*K. Kuttikrishna Menon*) for Respondents.

K.S.

Horwill, J. Anantapur Municipal Council *v.* Diesel
14th October, 1942. and Electrical Company.

A.A.O. No. 205 of 1942.

Arbitration Act (X of 1940)—Applicability—Act how far retrospective.

Sections 47 and 48 of the Arbitration Act clearly show that the Act is intended to apply to all proceedings which had not begun when the Act came into force, although the agreement to refer to arbitration might have been entered into long before the Act was enacted.

S. Muthiah Mudaliar for Appellant.

V. S. Narasimhachar for Respondent.

K.S.

Happell, J. Province of Madras *v.* Maharaja of Jeypore.
14th October, 1942.

C.R.P. Nos. 941 to 951 of 1942.

Civil Procedure Code (V of 1908), *section* 80—*Suits under section* 14 *of Madras Survey and Boundaries Act—Two months' notice under section* 80 *of the Civil Procedure Code—Necessity.*

Notice—Day of service to be excluded from period of two months.

In the case of a suit brought under section 14 of the Madras Survey and Boundaries Act, there is no reason why the Government should not have the two months' notice required by section 80 of the Code. A.I.R. 1934 Bom. 162, distinguished. A suit against the Government under section 14 of the Survey and Boundaries Act is distinguishable from a suit under Order 21, rule 63 of the Code, for, a suit under section 14 of the Survey and Boundaries Act cannot be regarded as a suit in the nature of an appeal and notice cannot be dispensed with.

Even if the Government is added merely as a *pro forma* defendant such a notice is necessary and in computing the period of two months the day on which it was actually served must be excluded.

The Government Pleader (*K. Kuttikrishna Menon*) for Petitioner.

D. V. Reddi Pantulu for Respondent.

K.S.

Kuppuswami Ayyar, J. Angamuthu Pillai *v.* Subba Rao.
16th October, 1942.

A.A.A.O. No. 195 of 1941.

Civil Procedure Code (V of 1908), *Order* 21, *rule* 66—*Failure of judgment-debtor to attend Court in answer to notice under Order* 21, *rule* 66—*If estops him from contending that the terms of the proclamation as fixed by the Court were incorrect.*

In fixing the terms of the sale proclamation all the orders passed are not judicial orders—several of them being only administrative ones—and if a judgment-debtor failed to appear in Court and raise his objections, he would not be estopped from raising those objections at a later stage. By the mere fact that the judgment-debtor did not attend Court in answer to a notice to him under Order 21, rule 66, it cannot be said that he could be estopped from contending that the terms of the proclamation as fixed by the Court were incorrect, or that the sale had not been properly proclaimed and that the Court had committed an irregularity which vitiated the sale.

K. G. Srinivasa Aiyar for Appellant.

S. Parthasarathi and *V. K. Thiruvenkatachari* for Respondent.

K.S.

Happell, J. Jalajakshi *v.* Narayanan Nayar and others.
19th October, 1942.

C.R.P. No. 1648 of 1941.

Civil Procedure Code (V of 1908), Order 21, rule 89, clause (i) (b)—*Scope.*

The petitioner held a decree for the payment to him as costs of two sums namely Rs. 121-12-8 and Rs. 128-0-9. She took out execution and in the proclamation of sale there was an omission to show the sum of Rs. 121-12-8. The property was sold and a junior member of the judgment-debtor's tarwad, filed an application for the sale to be set aside under Order 21, rule 89 and deposited a sum of Rs. 158 in compliance with the terms of that rule. The amount for the recovery of which the sale was ordered was no doubt Rs. 121-12-8, plus Rs. 128-0-9.

Held: According to the plain meaning of the words in the rule "the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered" the amount deposited was sufficient and the sale must be set aside. A.I.R. 1935 Lah. 423, approved.

O. T. G. Nambiar for Petitioner.

P. Govinda Menon for Respondent.

K.S.

Bell, J. Mohammad Usman and Company *v.* Kottekkaran Kunhamu.
21st October, 1942.

C.R.P. N. 1911 of 1941.

Civil Procedure Code (V of 1908), Order 38—Arrest before judgment—Debtor finding surety under Order 38, rule 2—Surety obtaining discharge after passing of decree under rule 3—Necessity to call upon defendant to find fresh surety—Proper procedure.

A plaintiff obtained an order under Order 38, Code of Civil Procedure, for the arrest of the defendant before judgment. The defendant found surety under Order 38, rule 2. This surety, after decree applied for his discharge under Order 38, rule 3 and as the conditions were complied with he was discharged. The Court thought that the decree having been passed Order 38 was no longer applicable, but something in the nature of proceedings under section 51 of the Code of Civil Procedure was. On revision,

Held: As the arrest of the debtor was made under Order 38, the proceedings must continue under that Order. The Court must therefore call upon the defendant to find fresh security under rule 3 and if he fails to comply with that or any other order under rule 2 or 3, the Court has a discretion to commit him to prison.

B. Pocker for Petitioner.

O. T. G. Nambiar for Respondent.

K.S.

Kuppuswami Ayyar, J. Province of Madras *v.* Vellayan Chettiar and others.
21st Octbber, 1942.

S.A. No. 867 of 1941.

Zamindari—Use of property as cremation ground for 60 years—Maxim presumitur retro—*If applicable.*

It was found that the use of certain property within a Zamindari as a cremation ground started only sixty years ago, in any event within hundred years and did not go beyond that. It was contended on behalf of the Government that it should be presumed that even before that it must have been a cremation ground by the application of the maxim, *presumitur retro* and that if it could be so presumed it would follow that it was a cremation ground on the date of the Permanent Settlement in 1803 and that the legal ownership would be in the Government and the Zamindar's representative could not claim any right in it after it ceased to be used as a cremation ground.

Held: It was only a rebuttable presumption. If the land was used as cremation ground only for 60 years it must have been waste land before

that and the burden is on the Government to prove that it was excluded from the grant of the Zamindari. In the absence of any evidence, there is justification for finding that the property belonged to the Zamindar.

The Government Pleader (*K. Kuttikrishna Menon*) for Appellant.

V. Ramaswami Aiyar for Respondent.

K.S.

Byers, J. Raju Naidu and another—Accused.
26th October, 1942.

Crl.R.C. Nos. 571 and 572 of 1942.
(Crl.R.P. Nos. 544 and 545 of 1942.)

Motor Vehicles Act (IV of 1939), section 71 (2).

The provisions of section 71 (2) of the Motor Vehicles Act are mandatory and it is necessary before a speed limit can be enforced that there should be a prior notification in the Gazette.

K. S. Jayarama Aiyar for G. Natarajan for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Horwill, J. Mangeshwar Srimad Ananthishwar Temple
2nd November, 1942. *v.* Vaikunta Baktha and others.

S.A. No. 407 of 1941.

Madras Hindu Religious Endowments Act (II of 1927), section 73—Scope—Suit for accounts and damages against ex-trustees of a temple—Previous consent of the Board not necessary.

A suit by the present trustees of a temple against the past trustees for a general account of their management along with a claim for recovery from them of damages said to have been sustained by reason of their alleged misfeasance, malfeasance and nonfeasance is maintainable under the general law. The previous consent of the Board under section 73 of the Madras Hindu Religious Endowments Act is not necessary for such a suit. For deciding whether such consent is necessary the tests applicable are the same as those in suits under section 92 of the Civil Procedure Code.

B. Sitarama Rao and *M. G. Kamath* for Appellants.

K. Rajah Aiyar, M. L. Nayak and *K. P. Sarvothama Rao* for Respondents.

K.S.

Horwill, J.
12th October, 1942.

Vasudeva Aithala *v.* Krishna Aithala and others.
A.A.O. No. 418 of 1941.

Hindu Law—Joint family—Agreement to give up right to partition—When enforceable.

A coparcener cannot be deprived of his ordinary rights under Hindu Law to claim a partition of the family property unless it is very clear that he bound himself for consideration not to exercise that right; and even then it is doubtful whether such an agreement would not be against public policy. Assuming that there is nothing invalid in law in an agreement to give up one's right to partition, such a renunciation must be very clear and explicit.

K. Vittal Rao for Appellant.

T. Krishna Rao for Respondent.

K.S.

Mockett and Abdur Rahman, JJ.
16th October, 1942.

Chinnaswami Naidu *v.* Oomai *alias* Perumal Naidu and others.
Appeal No. 113 of 1939.

Transfer of Property Act (IV of 1882), *section* 43*—Scope—Transferee acting on erroneous representation—No enquiries made by him—Effect on his right.*

Where a transferee has acted on the representation erroneously made by a person that he was authorised to transfer the property, it cannot be contended when such transferee seeks relief under section 43 of the Transfer of Property Act, that the plaintiff though he had believed and acted on the erroneous representation nevertheless had not been industrious in making enquiries. There is no authority for the proposition that such enquiries are necessary.

28 M.L.J. 44 and 34 Mad. 159, considered.

K. V. Ramachandra Aiyar and *S. Thyagaraja Aiyar* for Appellant.

T. L. Venkatarama Aiyar for Respondent.

K.S.

Horwill, J.
19th October, 1942.

Govindaswami Chettiar *v.* Tirupur Lakshmi Vilas Nidhi, Limited.
C.R.P.No. 1628 of 1941.

Appeal—Insolvency Court refusing to order prosecution of insolvent—Creditor who brought the matter to the notice of the Court not entitled to appeal.

An insolvent allowed a large number of debts due to him to become time-barred with the result that great loss accrued to the creditors. One of the creditors put in a petition to the Insolvency Court drawing its attention to this matter and the Court after considering whether it would order a prosecution of the insolvent dismissed the creditor's application saying that sending the insolvent to the jail would not help the creditors to get their money and it was pure vindictiveness on the part of the creditor to file the application. The creditor appealed and the District Judge ordered that the complaint should be filed. On revision,

Held: The lower appellate Court had no jurisdiction to entertain the appeal except on the motion of some person aggrieved and a creditor is not a person aggrieved by an order refusing to prosecute the insolvent. The Crown, the State, or some public officer, possibly the Official Receiver might be a person aggrieved but not an individual creditor who has lost nothing by the insolvent not being prosecuted.

P. Govinda Menon for Petitioner.

M. Krishna Bharathi for Respondent.

K.S.

N R C

Happell, J. Srinivasa Mudaliar *v.* Ramudu Naidu.
20th October, 1942.

C.R.P. No. 1725 of 1941.

Provincial Small Cause Courts Act (IX of 1887), *section* 34 *and Civil Procedure Code (V of* 1908), *section* 73 *and Order* 21, *rule* 82—*Scope.*

If for the purposes of execution a small cause decree has to be transferred to the original side of the Court though presided over by the same Judge for the reason that the sale of immovable property in execution of that decree can only be ordered by a Court other than a Court of Small Causes, the assets received by reason of the sale in execution of the decree must be regarded as received on the original side of the Court.

24 M.L.J. 601, relied on.

Under section 73 of the Code of Civil Procedure in order that a decree-holder may be entitled to rateable distribution an application has to be made for execution to the Court holding the assets before the receipt of those assets. Accordingly a person holding another small cause decree asking for rateable distribution where immovable properties are sold in execution of a small cause decree must apply to the Court other than the Small Cause Court, though the same Judge is exercising small cause and original jurisdiction.

S. Ramachandra Aiyar for Petitioner.

R. Viswanathan and *N. D. Varadachari* for Respondent.

K.S.

Kuppuswami Ayyar, J. Calicut Bank, Ltd. (in liquidation) *v.* Mekkat.
21st October, 1942.

A.A.A.O. Nos. 179 and 181 of 1940.

Companies Act (VII of 1913), *section* 171—*Bank a puisne mortgagee party to mortgage suit and execution—Liquidation of bank—Leave of Court to proceed with execution—Necessity.*

A bank which was a puisne mortgagee was a defendant in a mortgage suit and execution proceedings. After the bank went into liquidation the decree-holder continued execution proceedings without obtaining sanction of the Court under section 171 of the Companies Act.

Held, (1) A puisne mortgagee is also a person liable to pay the amount due under the mortgage decree.

(1940) 2 M.L.J. 513, relied on.

(2) The word "proceedings" in section 171 of the Companies Act need not necessarily relate to independent originating proceedings, but may relate to supplemental proceedings also like execution under a judgment in an action. The object of the section is to enable the Court, which ordered the liquidation or winding up of a company to know whether it will be necessary to continue the execution proceedings against the company and whether it will not be advisable to adjust the matter out of Court and to give the necessary instructions to the liquidator.

I.L.R. 1941 Lah. 760, dissented from.

I.L.R. 58 Mad. 781 and (1880) Ch.D. 502, applied.

V. K. John and *R. Rajeswara Rao* for Appellants.

C. S. Swaminathan, V. Radhakrishnayya, K. P. Ramakrishna Aiyar and *E. V. Sundara Reddi* for Respondents.

K.S.

Horwill, J. Rathnasabapathy Odayar *v.*
22nd October, 1942. Ramayya Pillai and others.

A.A.O. No. 390 of 1941.

Provincial Insolvency Act (V of 1920), *sections* 33, 50 (2) *and* 68—*Official Receiver entering name of creditor in schedule—Expunging such name—Procedure.*

After a transfer of property by an insolvent was set aside under section 54 of the Provincial Insolvency Act the transferee filed an application before the Official Receiver to enter his name in the schedule of creditors for the sum which the District Judge had found to have been good consideration while setting aside the sale. The Receiver, instead of issuing

notice, as he should have done, under section 33 (3), admitted the claim whereupon one of the creditors filed an application under section 50 (2) of the Act to the District Judge to have the entry expunged from the schedule of creditors on the ground that no notice had gone to the creditors, that the Official Receiver was interested in the matter, and that inquiry would show that very little consideration had passed. The District Judge considered that the real remedy of the creditor was under section 68 to apply to the Court against the order of the Receiver within twenty one days and as it had not been done, he dismissed the application. On appeal,

Held: (*i*) As section 50 (2) deals specifically with an application to expunge an entry, it is not necessary that an application for that purpose should be made within twenty one days, as an application under section 68 should.

(*ii*) In considering an application under section 33 to enter a creditor's name in the list of creditors though the Official Receiver would be acting in a judicial capacity he would be bound by a prior decision, only if that decision operated as *res judicata*.

(*iii*) As in the instant case even if notice had gone to the other creditors the Receiver would have included the name of the transferee whose purchase had been set aside as creditor, the name ought not to be expunged.

A. V. Viswanatha Sastri for Appellant.

C. R. Pattabhiraman, R. Rajagopalachari and *S. V. Rama Aiyangar* for Respondents.

K.S.

Horwill, J.
23rd October, 1942.

Pitchiah *v.* Venkatappayya.
S.A. No. 706 of 1940.

Madras Survey and Boundaries Act (IV of 1897)—Suit arising out of decision of Survey Officer—Government, if can be impleaded.

The Survey Officer, giving a decision under the Survey and Boundaries Act, although a Government servant, acts in a judicial capacity and accordingly Government ought not to be impleaded as a party in a suit that arises out of the decision of the Survey Officer.

K. Kuppuswami for Appellant.

Ch. Raghava Rao and the Government Pleader (*K. Kuttikrishna Menon*) for Respondents.

K.S.

Kuppuswami Ayyar, J.
23rd October, 1942.

Official Receiver, Tinnevelly *v.* Ramakrishna Aiyar and others.
A.A.A.O. No. 47 of 1940.

Hindu Law—Joint family—Decree against father and his sons—Insolvency of father—Execution against family assets in the hands of sons—Permissibility.

A decree was obtained against *X*, a Hindu father and his undivided sons and grandsons, the liability against the latter being fixed under the pious obligation doctrine. In execution of the decree *X* was exonerated and the decree was sought to be executed against the ancestral properties in the hands of the sons and grandsons who had become divided from *X*.

Held: As the decree had been obtained against the father and also against the sons to the extent of their joint family properties it will be open to the decree-holder to proceed against any of those persons against whom he had obtained the decree. There was no extinguishment of the decree merely because the decree-holder stated in the execution petition that he exonerated *X*. A debt could be extinguished only by payment or by operation of law.

I.L.R. 40 Mad. 581, distinguished.

R. S. Srinivasacharya and *K. V. Rajagopalan* for Appellant.

K. S. Sankara Aiyar for Respondent.

K.S.

Kuppuswami Ayyar, J.
27th October, 1942.

Subbier *v.* Seth Tahalram Dayaldar Firm.
A.A.A.O. No. 40 of 1942.

Partnership—Power of attorney by firm to an agent—Death of one of the partners—Effect—Execution petition by power of attorney agent not maintainable.

In the case of partnership firms where a power is granted by all the partners the agency terminates on the death of one of the partners.

(1938) 1 M.L.J. 610, relied on.

I.L.R. 1937 Nag. 28 and 21 C.W.N. 620, not followed.

Accordingly an execution petition filed by a power of attorney agent signed as agent of the firm and not as the agent of the surviving partners is not maintainable.

A. Swaminatha Aiyar for Appellant.

K. V. Srinivasa Aiyar for Respondent.

K.S.

Happell, J.
29th October, 1942.

Palani Goundan *v.* Kali Ammal and others.
C.R.P. No. 1429 of 1941.

Hindu Law—Suit by co-widow against her husband's brother alleging a partition claiming her husband's share—Other widow opposing her claim alleging that there was no partition—Valuation of suit for jurisdiction.

Plaintiff and the third defendant were co-widows and a suit was brought by the plaintiff in the Court of the Subordinate Judge for partition of the whole of the husband's share in joint family property alleging an oral partition from the first defendant before the husband's death. The third defendant in her written statement denied the fact of partition and stated that in any event she did not want separation of her share. In the circumstances,

Held, that the plaintiff was entitled to sue only for her half share of the husband's property and where the value of such share was only Rs. 750 the suit cannot be filed in the Court of the Subordinate Judge but should have been filed in the Court of the District Munsiff. The plaint must therefore be returned for presentation to the proper Court.

21 M.L.J. 997, relied on.

T. V. Ramanatha Aiyar and *T. S. Venkatarama Aiyar* for Petitioner.

T. K. Subramania Pillai for Respondent.

K.S.

Horwill, J.
2nd November, 1942.

Chinnammal *v.* Alwar Naidu.
C.R.P. No. 1888 of 1941.

Civil Procedure Code (V of 1908), Order 47, rule 1—Application for review—If can be allowed merely because of default of appearance of other side.

A review application does not lie on any ground other than those set out in Order 47, rule 1. Accordingly a Court has no jurisdiction to allow a review application because of default of appearance of the other side.

K. Srinivasan and *N. T. Ragunathan* for Petitioner.

V. Srinivasan for Respondent.

K.S.

Horwill, J. Papamma *v.* Official Receiver, Cuddapah.
2nd November, 1942. **S.A. No. 533 of 1941.**

Provincial Insolvency Act (V of 1920), *sections* 4 *and* 5—*Application under for a declaration that property belonged to applicant and for injunction restraining Official Receiver from including it in the estate of insolvent and selling it—Dismissal for default and dismissal of application for restoration of same—If bars subsequent suit for that relief—Civil Procedure Code (V of* 1908), *Order* 9, *rule* 9—*Applicability.*

The Official Receiver proceeded to sell the suit property as if it were the property of the insolvent and early in the administration the plaintiff (the insolvent's daughter) filed an application under sections 4 and 5 of the Provincial Insolvency Act asking for a declaration that the property in question belonged to her and for an injunction restraining the Official Receiver from including that land in the estate of the insolvent and selling it. On 29th November, 1937, the District Munsiff, dismissed the application for default of appearance. She then filed an application to restore the petition, which was dismissed on the ground that she had frequently defaulted and that her application was not a *bona fide* one. She then filed a suit against the Official Receiver, again setting up her title to the land. The Official Receiver raised the preliminary objection that the matter had been concluded by the order on her earlier petition and both the District Munsiff and the District Judge in appeal upheld the objection. On second appeal,

Held: As the earlier petition was not disposed of on the merits but was dismissed for default of appearance, section 4 of the Provincial Insolvency Act was no bar to the plaintiff filing a suit.

By virtue of section 5 (2) of the Provincial Insolvency Act, in regard to proceedings under that Act, the Courts have to follow the same procedure as they have and follow in respect of suits. Accordingly the first part of Order 9, rule 9 of the Civil Procedure Code must be applied. But as the wording of section 5 (1) of the Provincial Insolvency Act has regard only to "proceedings under the Act'' the ''suit" will not be barred.

The equitable principle of election which is only a special application of the general principle of *res judicata* cannot be applied as otherwise there would be no need for section 4 (2) of the Act. Even if it were to apply it may not bar a fresh proceeding when the point in issue had not been considered in the earlier proceeding.

T. K. Srinivasa Thathachariar for Appellant.

A. Bhujanga Rao and *D. R. Krishna Rao* for Respondent.

K.S.

Krishnaswami Ayyangar and Kunhi Raman, JJ. Kunhi Kammaran Nair *v.* Sulaiman Haji and others.
2nd November, 1942. **A.A.O. No. 5 of 1941.**

Civil Procedure Code (V of 1908), *section* 36—*Scope—Order that ''receiver do recover Rs.* 1,500 *from the assets of the plaint temple"—Executability.*

Where an order was "This Court doth order and decree that the receiver petitioner do recover Rs. 1,500 from the assets of the plaint temple" and execution therein when sought was resisted on the ground that it was merely declaratory in character,

Held: The language of the order does not show that it was the intention of the Court merely to declare a liability leaving it to be enforced by an independent suit. The language of section 36 of the Civil Procedure Code (1908), which has repealed section 649 of the Code of 1889 is wider in its operation and can cover a case where a receiver is the person in whose favour an order like the one in the present case has been passed. Such an order is executable.

I.L.R. 52 Cal. 269 and A.I.R. 1934 Lah. 46, relied on.

10 M.L.J. 241, distinguished.

N R C

P. Govinda Menon for Appellant.

K. Kuttikrishna Menon, P. V. Rajamannar and *K. M. Balasubramaniam* for Respondent.

K.S.

Krishnaswami Ayyangar and Kunhi Raman, JJ.
2nd November, 1942.

Ramanathan Chettiar *v.* Kasi Chettiar and others.
A.A.O. No. 305 of 1942.

Civil Procedure Code (V of 1908), Order 21, rule 29—Order under—"Stay pending disposal of suit"—Scope—If extends to appeal on the suit.

The word "suit" in rule 29 of Order 21 of the Civil Procedure Code means the suit and not the appeal or appeals therefrom to the appellate Court.

I.L.R. 55 Cal. 512 and I.L.R. 58 Cal. 1113, relied on.

1915 M.W.N. 844, considered and distinguished.

Accordingly stay granted under Order 21, rule 29 "until decision of C.S. No. * * * on the file of the lower Court" cannot continue even after disposal of the suit.

A. Swaminatha Aiyar for Appellant.

V. Ramaswami Aiyar, N. G. Krishna Aiyangar and *S. Thyagaraja Aiyar* for Respondents.

K.S.

Horwill, J.
4th November, 1942.

Meenakshi and another (minors) *v.* Ayyamperumal Udayan and others.
C.R.P. No. 347 of 1942.

Civil Procedure Code (V of 1908), section 35-A—"Party"—Next friend of minor—If can be made liable for compensatory costs under section 35-A.

Section 35-A of the Civil Procedure Code is, as it were, an appendix to section 35 and is intended to deal with some exceptional cases for which the exercise of ordinary discretion of the Court under section 35 could not afford a sufficient compensation. Strictly speaking there can be no "party" to a suit other than a plaintiff or a defendant; but cases have occurred in which the word "party" has been given a more vulgar interpretation. Section 35-A speaks of the party objecting to the claim or the "party by whom such claim or defence has been put forward". Accordingly the next friend of a minor plaintiff can be made liable for compensatory costs under section 35-A as well as for ordinary costs under section 35.

K. S. Desikan for Petitioner.

N. Suryanarayana for Respondent.

K.S.

Abdur Rahman, J.
6th November, 1942.

Venkitarama Aiyar *v.* Ulattil Pachus.
C.R.P. No. 2458 of 1941.

Madras Debt Conciliation Act (XI of 1936), section 27—Time taken in obtaining certified copies of Board's orders excluded for purposes of limitation—Computation—Copies sent by post under rule 22 of rules framed under section 29—Effect.

The only procedure provided under the Debt Conciliation Act for delivery of certified copies of its orders is to send them by post. For computing the period of limitation for filing a suit by a creditor the period till the delivery of the copies by the post office to the creditor must be excluded under section 27 of the Debt Conciliation Act as time taken in obtaining the certified copies of the Board's orders.

Where copies are sent to the parties by the Board under rule 22 of the rules framed under section 29 of the Act, the Post Office must be held to be the agent of the copying department and not of the party.

N. R. Sesha Aiyar for Petitioner.

D. A. Krishna Variar for Respondent.

K.S.

Kunhi Raman, J.
6th November, 1942.

Sivathi Ammal and others *v.* Meikola Odayar and others.
S.A. No. 919 of 1941.

Civil Procedure Code (V of 1908), Order 22, rule 9 (1)—Scope—"Subject-matter"—To be construed strictly.

While a suit for an injunction preventing the defendants in that suit from trespassing upon the subject-matter of that suit was pending a petition was filed for impleading *X*, *Y* and *Z* as party defendants for the alleged reason that they were also threatening to trespass upon the subject-matter of the litigation. The petition was dismissed. Thereupon the plaintiff in that suit applied for permission to withdraw the suit with liberty to bring a fresh suit. Such permission was granted and the suit was accordingly withdrawn and dismissed. Subsequently that plaintiff along with three others filed a fresh suit praying for a declaration of the plaintiff's title to the property and for an injunction. It was contended by *X*, *Y* and *Z* who were some of the defendants in the second suit that in view of the provisions of Order 22, rule 9 of the Code of Civil Procedure the suit was not maintainable against them.

Held: The cause of action in the two suits was not the same. In the earlier suit the allegation was that the defendants were threatening to trespass upon the property but there was no prayer for declaration of title. The expression "subject-matter" must be construed strictly in a penal provision of this character. Accordingly Order 22, rule 9 of the Civil Procedure Code does not operate as a bar to the later suit.

I.L.R. 39 Mad. 987, applied.

V. Meenakshisundaram for Appellant.

R. Kesava Aiyangar for Respondents.

K.S.

Kuppuswami Ayyar, J.
10th November, 1942.

Ratnasamy Nadar *v.* Municipal Council, Virudnagar.
S.A. No. 44 of 1942.

Madras District Municipalities Act (V of 1920), section 182—Projection over air space over street—Prescriptive right acquired by owner of adjoining building—Removal by municipal council—Right of owner to compensation.

Under the Madras District Municipalities Act, the term "street" as vested in the municipal council would include not only the surface of the soil but also the space above it and beneath it to an extent of about twelve feet as is necessary for repairing and management of the street by the municipality.

As section 182 of the Municipalities Act gives power to the Chairman to remove any projection from a building "in or over" a street he can call upon the owner to remove the same, however high in the air such projection may be. Where however the projection has existed sufficiently long to give the owner a prescriptive right, the owner is entitled to have a declaration that it could not be removed without payment of compensation to him.

K. V. Srinivasa Aiyar for Appellant.

K. Kuttikrishna Menon for Respondent.

K.S.

Kuppuswami Ayyar, J.
10th November, 1942.

Nayudamma v. Dharamchand Kottavaru.
S.A. Nos. 354 and 355 of 1941.

Practice—Attachment before judgment—Dismissal of suit—Subsequent restoration on review and decree—Effect on attachment.

An attachment before judgment can be availed of by a plaintiff decree-holder whose suit was originally dismissed by the trial Court but was decreed subsequently, on a review petition filed by him. The attachment did not

terminate on the earlier dismissal of the suit and the purchasers of the property in the interval between the dismissal of the suit and the review cannot resist the decree-holder's right to proceed against the property.

V. Subramaniam for Appellant.

P. Satyanarayana Rao and *Y. G. Krishnamurthi* for Respondent.

K.S.

Kuppuswami Ayyar, J.
12th November, 1942.

Major John *v.* Meenakshi Mills, Ltd., Madura.
C.R.P. No. 859 of 1942.

Civil Procedure Code (V of 1908), sections 151 and 152—Scope.

Where in a suit for damages for breach of contract to sell property entered into by the receiver of an estate, a personal decree was passed against the receiver in addition to a decree against the estate and an application was made for amending the decree so as to delete the personal decree as being an accidental slip,

Held, that the remedy of the receiver was only by way of appeal against the decree and the application for amendment was unsustainable in law.

V. T. Rangaswami Aiyangar for Petitioner.

K. V. Srinivasa Aiyar for Respondent.

K.S.

Krishnaswami Ayyangar and Kunhi Raman, JJ.
16th November, 1942.

Secretary of State *v.* G. L. Kantha Rao.
A.A.O. No. 686 of 1941.

Interest—Pendency of appeal—Deposit of decree amount in Court to be drawn on furnishing security—Inability to furnish security—Amount invested in Imperial Bank—Dismissal of appeal—Decree-holder's right to interest.

The Government filed an appeal against a money-decree passed against it and deposited the decree amount in Court and obtained an order that the decree-holder should draw the amount deposited only on his furnishing security. On the decree-holder being unable to furnish security, the amount was at the request of the parties invested in fixed deposit in the Imperial Bank of India. On the dismissal of the appeal the decree-holder in execution claimed interest awarded under the decree from the date of deposit into Court till the date of the dismissal of the appeal, after giving credit to the interest earned by the fixed deposit in the Bank.

Held, that the decree-holder was entitled to the interest awarded by the decree. The deposit by Government being only conditional did not affect the decree-holder's right.

Held, further, that the fixed deposit was not intended to affect the decree-holder's right to interest, but was more for the benefit of the Government.

The Government Pleader (*K. Kuttikrishna Menon*) for Appellant.

D. Narasaraju and *V. Ramaswami* for Respondent.

K.S.

Kuppuswami Ayyar, J. Kunhikaruvan *v.* Raman Nambiar.
9th November, 1942. **C.R.P. No. 398 of 1942.**

Madras Elementary Education Act (VIII of 1920), *rule* 13 *(of the rules under)—Contract for payment by succeeding manager to his predecessor of a particular amount out of grant—If illegal as opposed to public policy.*

When the plaintiff handed over the management of a girl's school to the defendants' predecessor in interest there was an agreement that the plaintiff should be paid a particular amount every year and when plaintiff sued to recover it the defendants contended that such a contract was invalid as being opposed to the rules under the Elementary Education Act, rule 13 of which provided that not less than 85 per cent. of the teaching grant shall be paid to the teachers employed in it by way of salary.

Held, that inasmuch as out of the balance of the grant after giving 85 per cent. to the teachers the manager may take some amount as remuneration for himself, if out of such amount the manager had agreed to pay the plaintiff any sum it would not make the contract illegal.

P. Chandrasekhara Menon for Petitioner.

A. Atchuthan Nambiar for Respondent.

K.S.

Kuppuswami Ayyar, J. South Indian Railway Company, Ltd.
9th November, 1942. *v.* Adam Hajee Peer Muhammad.
C.R.P. No. 2600 of 1941.

Railway—Consignment of sugar under risk note Forms A and H—Damage by rain water—Liability.

In a suit for damages against a Railway company claiming that some bags out of a consignment of sugar (booked under risk note forms A and H) got wet, *held*, (1) that the Railway Company cannot be made liable for damage caused by water going in through the crevices in the wagon on account of the force of the wind. 67 M.L.J. 704, relied on. (2) The burden of proving misconduct on the part of the railway company's servants as the cause of damage is on the plaintiff. (3) Where the Railway Company has explained the circumstances under which the goods were likely to have got damaged, for example by monsoon, and there was no evidence to show that the damage was not caused in that manner but by misconduct on the part of the Railway Company the plaintiff is not entitled to succeed.

S. S. Ramachandra Aiyar for Petitioner.

P. Govinda Menon for Respondent.

K.S.

Horwill, J. Yarlagadda Abbayi and another *v.*
12th November, 1942. Official Receiver, East Godavary.
A.A.A.O. No. 157 of 1941 converted into C.R.P. No. 1574 of 1942.

Provincial Insolvency Act (V of 1920), *sections* 53, 4 *and* 75—*Application asking for relief under section* 53 *linked with one under section* 4—*No second appeal lies.*

Where an application made for setting aside a partition decree on the insolvency of a Hindu father on the ground that it was fraudulently and collusively obtained was dismissed by the trial Court and on appeal the District Judge held the opposite view and set aside the partition decree, no second appeal lies merely because the relief asked for under section 53 was linked to one under section 4. Only decisions under section 4 should be the subject of second appeals.

P. V. Vallabacharyulu for Appellant.

M. S. Ramachandra Rao for Respondent.

K.S.

N R C

Kuppuswami Ayyar, J.
12th November, 1942.

Venkateswara Swami Varu, Bezwada *v.* Sub-Collector, Bezwada.
C.R.P. No. 640 of 1941.

Land Acquisition Act (I of 1894), *section* 18—*Validity of reference by Collector—Cannot be questioned by the Subordinate Judge acting as Land Acquisition Court.*

It is the duty of the Collector before he makes the reference under the Land Acquisition Act to decide on the materials before him whether he should make the reference or not, and if he wishes to make and does make a reference, it is not open to the Land Acquisition Court to go behind it. If it is not open to the High Court or any other authority to interfere when the land acquisition Officer refuses to make a reference, his decision must be equally final when he decides to make and does make a reference.

D. Narasaraju for Petitioner.

The Government Pleader (*K. Kuttikrishna Menon*) for Respondent.

K.S.

Kuppuswami Ayyar, J.
19th November, 1942.

Narayanaswami and others *v.* Venkataswami and others.
C.R.P. No. 2670 of 1941.

Court-Fees Act (VII of 1870), *section* 7, *clause* (10) (a)—*Contract by mortgagor to sell property to mortgagee in discharge of mortgage—Suit for specific performance—Court-fee payable.*

The plaintiff had a mortgage right over certain properties and it was arranged in 1937 that in view of the amount due under the mortgage certain properties should be conveyed to him, and there was a further clause that in case the properties were not conveyed he would be entitled to recover the money due under the mortgage. When Madras Act IV of 1938 was passed the amount due under the mortgage could be scaled down to Rs. 4,000. The mortgagors refused to execute a conveyance and the plaintiff filed a suit for specific performance of the agreement to convey or in the alternative for recovery of the amount due under the mortgage. The plaintiff valued the claim at Rs. 4,000 and paid court-fee thereon and contended that the contract was not really one of sale as only the unliquidated amount payable in respect of the mortgage without the same being ascertained was stated to be the consideration for the sale.

Held: The consideration was the amount due under the mortgage which must be taken as the price agreed to be paid for the conveyance. It was therefore clearly a sale because the price was capable of being ascertained in money. Accordingly the relief cannot be said to be incapable of being valued so as to attract the provisions of section 17 (*b*) of Schedule II of the Court-Fees Act and the suit is governed by section 7, clause (10) (*a*) of the Court-Fees Act and court-fee must be paid as on the amount due under the mortgage on the date of the contract, sought to be specifically enforced.

P. V. Rajamannar and *K. Subba Rao* for Petitioner.

The Government Pleader (*K. Kuttikrishna Menon*) and *C. V. Dikshitulu* for Respondent.

K.S.

Kuppuswami Ayyar, J.
24th November, 1942.

Palaniappa Chettiar *v.* Subramanian Chettiar and others.
C.R.P. Nos. 2587 and 2589 of 1941.

Court-fees—Suit for dissolution of partnership and taking accounts—Court-fee payable.

In a suit for dissolution of partnership and taking of accounts the extent of the assets and what the assets are will have to be decided in the suit. The fact that incidentally the claim of certain other persons who are

not parties to the partnership agreement will be decided will not make it an additional prayer or a separate relief, to justify the plaintiff being called upon to pay additional court-fees.

I.L.R. 1940 Mad. 259: (1940) 1 M.L.J. 32 (F.B.), applied.

A. V. Narayanaswami Aiyar for Petitioner.

Respondent not represented.

K.S.

Byers, J.
26th November, 1942.

Piramanayaga Pandaram and others, *In re.*
Crl.R.C. No. 626 of 1942.
(Case Referred No. 45 of 1942).

Criminal Procedure Code (*V of* 1898), *sections* 349 (1) *and* 562—*Relative scope.*

There is a fundamental difference between the position of accused persons dealt with under section 349 and section 562 of the Code of Criminal Procedure. Under the former section the accused are sent by a Court to the superior Magistrate with an expression of the Court's opinion that they are guilty and it is then the duty of the superior Magistrate to pass judgment upon them according to law. Under section 562 the accused persons come before the superior Magistrate as convicted persons and he has no other option but to proceed under section 380 of the Code, and pass sentence upon them in accordance with his powers. Section 349 (1) (*a*) has no application to the procedure under section 562 of the Code. It is open to a Magistrate to sentence some of the accused and refer the remainder to the superior Magistrate for the application of section 562 of the Code.

1936 M.W.N. 1351, not approved.

A. S. Sivakaminathan for the Public Prosecutor (*V. L. Ethiraj*), on behalf of the Crown.

K.S.

Somayya, J.
26th November, 1942.

Srinivasalu Chetty and another *v.* Muniswamy Chetty and others.
S.A. No. 461 of 1941.

Limitation Act (*IX of* 1908), *section* 6 *and Article* 125—*Alienation by limited owner—Reversioner then alive being minor—Subsequently born nearer reversioners—Suit for declaring alienation not to be binding on reversion—Time-limit—Extended period of limitation whether available.*

If the existence of a reversioner clothes an after-born reversioner with a right to sue, though an after-born reversioner cannot claim the benefit of section 6 of the Limitation Act in his own right, he cannot be deprived of the extended period available to the reversioner in existence at the time of the alienation.

The plaintiffs sued as reversioners for a declaration that certain alienations of the properties of their maternal grandfather were not binding on them beyond the lifetime of their mother. In 1920 when the primary alienation was made the plaintiffs were not born, and there was then in existence another reversioner who was an infant one year old. The two minor plaintiffs who were subsequently born sued by their next friend in 1937, and at that time the person who was the reversioner at the time of the alienation was also alive. The defendants contended that the suit was barred by limitation.

Held, that the suit was not time-barred as the plaintiffs were entitled to institute the suit at any time during which the person who was the reversioner at the date of the alienation could have filed the suit, and that they were also entitled to the extended period available to that reversioner by virtue of his minority.

I.L.R. 18 Lah. 395 and 79 I.C. 1019, relied on.

41 L.W. 610 and I.L.R. 47 All. 165 (P.C.), considered.

B. V. Viswanatha Aiyar for Appellants.

K. S. Desikan and *T. V. Ramanatha Aiyar* for Respondents.

B.V.V.

Krishnaswami Ayyangar, J. Gowrammal *v.* Subbappa.
27th November, 1942. **S.A. No. 309 of 1941.**

Gift of immovable property—Absence of registered instrument—Oral evidence—Materiality on question of prescriptive title of donee—Donee's possession through agents or trustees sufficient for perfecting title by prescription.

A gift of immovable property cannot be made except by a registered instrument as required by section 123 of the Transfer of Property Act. The defect cannot be cured either by the evidence of persons who were present at the time of the oral gift or of those to whom the donors owned to having made the gift. While such evidence may be valueless as substitutes for a written instrument, its materiality on the question of the prescriptive title set up by the donee is beyond question. *Varada Pillai* v. *Jevarathnammal*, I.L.R. 43 Mad. 244: 38 M.L.J. 313 (P.C.), referred to.

It is sufficient for the acquisition of prescriptive title that the donee had been in possession for the statutory period through her trustees or agents for the cultivation of the land on her behalf and actual physical possession is not essential.

Williams v. *Pott*, L.R. 12 Eq. 149; *Mitchell* v. *Morley*, (1914) 1 Ch. 438 and *Secretary of State* v. *Krishnamoni*, I.L.R. 29 Cal. 518 (P.C.), referred to.

C. S. Venkatachariar and *D. Ramaswami Aiyangar* for Appellant.

A. C. Sampath Aiyangar for Respondent.

K.S.

Krishnaswami Ayyangar, J. Nimmkampalli Ibrahim, *In re.*
30th November, 1942. **S.A. No. 1299 of 1942.**

Court-fees—Court-fee paid in pursuance of an order of taxing officer made after hearing the appellant—No right to refund—Order of taxing officer final under section 5 of the Court-Fees Act.

Where the court-fee was paid in pursuance of an order of the taxing officer made after hearing the appellant, that order being final under section 5 of the Court-Fees Act there is no right to claim a refund subsequently.

Kasturi Seshagiri Rao and *Kasturi Sivaprasada Rao* for Appellant.

P. Ananthan Nair for the Government Pleader (*K. Kuttikrishna Menon*), on behalf of the Crown.

K.S.